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In The

# Supreme Court of the United States

October Term, 1994

VIVIAN JOHNSON, M.D.,

*Petitioner,*

*vs.*

HILLS & DALES GENERAL HOSPITAL, THERESA DERRING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, KEN JENSEN, RHONDA HUME, THERON MIDDAUGH, CRAIG BELLEW, TOM OESCH, JOANN BROWN, CINDY KLAUS, (jointly & severally),

*Respondents.*

*Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to clarify whether the individually named corporate employees herein acted outside the scope of their employment for personal discriminatory reasons so as to violate 42 U.S.C. § 1985(3) and not be shielded by the intra corporate conspiracy doctrine.

2. Certiorari should be granted to resolve the conflict among the circuits relative to the application of the intra corporate conspiracy doctrine to the 42 U.S.C. § 1985(3) conspiracy provision.

## PARTIES TO THE PROCEEDING

Petitioner, Vivian Johnson, M.D., is a resident of Detroit, Michigan. She was the Plaintiff in the lower court proceedings of this case and was the Appellant before the United States Court of Appeals for the Sixth Circuit.

Respondent, Hills & Dales General Hospital is a privately owned health corporation, existing by virtue of the laws of the State of Michigan. Respondent Hills & Dales does business in Tuscola County Michigan and was a Defendant to the action in the lower court proceedings. Hills & Dales General Hospital was also an Appellee before the United States Court of Appeals for the Sixth Circuit.

Respondents, Theresa Deering, Dale Weidman, Myryka Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew, Tom Oesch, Joann Brown and Cindy Klaus, were all employees of Hills & Dales General Hospital with varying positions of authority. Each Respondent was a Defendant in the lower court proceedings and each was an Appellee before the United States Court of Appeals for the Sixth Circuit.

There are no other parties to this action.

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

On November 16, 1994, the United States Court of Appeals for the Sixth Circuit issued its opinion, affirming the decision of the District Court. That opinion (10a) was recommended for full text publication pursuant to Sixth Circuit Rule 24.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Sixth Circuit and its judgment of November 16, 1994. That judgment affirmed the lower court's grant of summary disposition. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

42 U.S.C. § 1985(3) provides:

§ 1985(3). Conspiracy To Interfere With Civil Rights.

> (3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protect of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support

> or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

## STATEMENT OF THE CASE

Petitioner, Dr. Vivian Johnson, worked in the Hills & Dales Hospital emergency room on weekends from September 1989 through April 1990. Her ordinary weekend hours were from Friday at 6:30 p.m. through Monday at 6:00 a.m. Dr. Johnson is African American. All of the Hospital emergency room Respondent employees are of European descent. Dr. Johnson entered into this business relationship through Mastercare Corporation, a physician placement agency.

As an emergency room physician, Dr. Johnson often interacted with the technical and support staff at the Respondent Hospital. Problems arose between Dr. Johnson and Respondent, Theresa Deering, Rhonda Hume, Doris Donahue, Dale Weidman and Theron Middaugh. Hume Donahue, Weidman and Middaugh then drafted and signed a memo to Respondent Ken Jensen, Hospital President, entitled "Employee Problems with Dr. Johnson."

Rhonda Hume initiated the memo. She has worked at the hospital as a medical technologist for ten years. She admits that

she is unable to order tests and that ordering tests is not a part of her job description. She also stated that Dr. Johnson would be in a better position than herself to know what lab tests are appropriate. Dr. Johnson frustrated her because Respondent Hume could never seem to get instructions or tasks right and Dr. Johnson required her to do the tasks again. In fact, the four Respondents who signed the memo alleged they were simply trying to avoid doing follow up work and avoid working extensively on weekends.

In initiating the memo, Rhonda Hume was "sure, firing Dr. Johnson would be one thing" which could occur. Hospital President Ken Jensen automatically and routinely fires Mastercare doctors whenever there is unrest on the staff. Rhonda Hume, knowing this, told Ken Jensen that if she never works with Dr. Johnson again, it would be too soon. As a young adult, Respondent Hume admittedly used racial slurs to refer to African Americans.

Doris Donahue was a registered medical technologist at the hospital. She states that she was called in more often on weekends by Dr. Johnson than by any other doctor, sometimes more than once a night. She often got upset with Dr. Johnson when called in, because she figured she would be working all night. Respondent Donahue often got disgusted with Dr. Johnson's ordering of what Donahue called "excessive tests." She admits however, that she is not qualified to make decisions about what tests a patient needs. She often wanted to go home and let the next shift perform the tests, but Dr. Johnson insisted that she do her job.

She stated that she was worn out and didn't want to work weekends; avoiding such weekends was her objective in signing the memo. In fact, she clearly stated her sole purpose in signing the memo was to avoid being called in by Dr. Johnson on weekends.

Theron Middaugh is a lab assistant. He admits he is not qualified to make decisions regarding what tests are appropriate or necessary for a patient. His complaint was that Dr. Johnson made sarcastic remarks to him. Out of eight interactions with Dr. Johnson, she was sarcastic only twice. Thus, his alleged purpose in signing the memo was to stop this "excessive sarcasm."

Theresa Deering is a radiologist at the hospital. She was upset over the fact that on the four nights that she was on call during Dr. Johnson's employ, Dr. Johnson called her in each night. She was particularly bitter toward Dr. Johnson over an incident where the doctor required her to take a patient down to x-ray six separate times. Respondent Deering believed that all six x-rays should have been ordered by Dr. Johnson at the same time, so Deering would have only had to make one trip. However, Deering admits she is not qualified to make decisions regarding what x-rays a patient needs. In fact, Doris Donahue stated that Dr. Johnson couldn't save that patient from such repeated trips because there were other patients in the emergency room that needed Dr. Johnson's attention.

Nevertheless, Deering complained to her supervisor Tom Oesch about the incident and issued the ultimatum that if Dr. Johnson was still there when Deering's medical leave expired, she would quit. Oesch assured her not to worry about it.

Dr. Johnson testified that Theresa Deering was extremely hostile towards her. Deering told her to take her black ass back to where she came from. She told Dr. Johnson that she was going to assure that people knew that Dr. Johnson did not know what she was doing. Deering and the other employees would approach people whom they knew may have known Dr. Johnson professionally and initiate conversations questioning her competence.

Specifically, Deering told Vicki Hyatt, a nurse at Sandusky Hospital, that Dr. Johnson was incompetent and dangerous to patients. Dr. Johnson was working there at the time.

Dale Weidman is a medical technologist at Hills & Dales Hospital. He believed that Dr. Johnson called him in more than other doctors did. He also believed he was required by Dr. Johnson to run too many lab tests. He admits, however, that he is not qualified to determine what tests need to be performed for a patient or whether a test needs to be repeated.

He did not believe that quality of care was an issue. His sole purpose in signing the memo was to get his work-load reduced.

Weidman told Roland Ellis, an employee at Yale Community Hospital, that Dr. Johnson had caused problems at the hospital, and the two discussed those problems. Weidman admits that Hills & Dales and the hospital at which Mr. Ellis works utilize shared services, and that he has spoken with Mr. Ellis about Dr. Johnson's work.

Jon C. Fahrner is in charge of the lab and also is the Director of Professional Services at the hospital. He admits that all lab test decisions are left solely to the doctor's discretion, unless it is thought that there is something detrimental to the patient's well-being. He heard the complaints from Hume, Donahue and Weidman regarding Dr. Johnson's "excessive" testing. However, he never concluded that any of her testing was excessive. Also, it was never concluded that the testing ordered by Dr. Johnson was inappropriate.

Fahrner also testified regarding employees being on call. He stated that all his people (Weidman, Hume, Donahue and Middaugh) have complained of working extra long hours on weekends and getting "burned out" totally unrelated to Dr.

Johnson's presence. It is typical for someone on call to be called in three to five times over a weekend. Dr. Johnson's calls to the employees who signed the memo against her were within this range. However, Fahrner states that this was the first time he had ever gotten a memo from employees complaining about a doctor. He concedes that someone in administration should have spoken to Dr. Johnson and gotten her side. However, no one ever did.

In the memo, Hume, Middaugh, Weidman and Donahue also accused Dr. Johnson of making errors in prescription dosage. However, according to Craig Bellew, who is the pharmacy director, every doctor on the staff made errors in prescription dosage. Yet Dr. Johnson is the first and only one ever reported to Respondent Fahrner.

In fact, none of the Respondents have ever submitted such a memo to administration against any doctor. Significantly, when they testified at deposition, most of the Respondents disavowed, or said they had no personal knowledge of, the substantive criticisms in the memo.

Ken Jensen, Hospital President, fired Dr. Johnson based upon the memo. He stated that the memo signers are not qualified to determine appropriate lab tests. He never witnessed any staff frustration affect the quality of patient care. He had his head radiologist look into the matter and the report was that there was no problem. In fact, it is Jensen's opinion that Dr. Johnson is an excellent doctor.

However, because he always accepts what his employees say about Mastercare doctors at face value, he fired Dr. Johnson. He stated that it is hospital policy to fire all Mastercare doctors solely due to staff unrest. The slightest infraction, and a Mastercare doctor was history. In Ken Jensen's words, "If you didn't smile, you wouldn't be asked back."

When terminating a doctor, Ken Jensen testified that Mastercare is never given any reason. On the six other occasions where Jensen terminated a Mastercare doctor, he simply told Mastercare "don't reschedule them." This was in keeping with his policy/practice that "[w]e don't get into fact. We don't get into clarifying anything." "[W]e get on the phone, say, 'don't send him back,' and that's the end of that."

However, Jensen testified that in Dr. Johnson's case "we might have offered that we had a problem . . ." More specifically, he stated that "[w]e might have" told Mastercare about the employee allegations that Dr. Johnson was making derogatory remarks toward them. In this regard, Lora Jones of Mastercare testified that Ken Jensen told her that employees were having petitions signed against Dr. Johnson and therefore, he did not want her rescheduled. Dr. Johnson testified that she was told by Lora Jones that Ken Jensen said to Lora Jones that he didn't want Dr. Johnson scheduled again because she was black.

Ken Jensen does not think that anyone at the hospital is uncomfortable working with African Americans. In fact, during his deposition he proudly volunteered the fact that "we employ 100 percent of the black working force in Cass City." With tongue in cheek, he revealed that that meant "one."

Petitioner filed a multi-count complaint alleging violations of 42 U.S.C. § 1985(3), 42 U.S.C. § 1981 and state law claims for intentional interference with contract and economic expectancy. The state law claims were dismissed without prejudice by the lower court. They were not pursued by the Petitioner in any state court.

The lower court elected not to examine the question of Petitioner's 1981 claim and dismissed it on May 6, 1993. The lower court also granted summary judgment to all Respondents, holding that the intra corporate conspiracy doctrine barred her claim under § 1985(3). The lower court further held that the individual Respondents had not acted outside the scope of their employment authority regarding comments made and actions taken against the Petitioner. This action was taken on May 11, 1993.

The Court of Appeals affirmed the holding of the lower court on November 16, 1994 in a published opinion.

Petitioner now seeks the review of this Court.

## REASONS FOR GRANTING THE WRIT

### I.

### CERTIORARI SHOULD BE GRANTED TO CLARIFY WHETHER THE INDIVIDUALLY NAMED CORPORATE EMPLOYEES HEREIN ACTED OUTSIDE THE SCOPE OF THEIR EMPLOYMENT FOR PERSONAL DISCRIMINATORY REASONS SO AS TO VIOLATE 42 U.S.C. § 1985(3) AND NOT BE SHIELDED BY THE INTRA CORPORATE CONSPIRACY DOCTRINE.

In the Sixth Circuit, a litigant can avoid the application of the intra corporate conspiracy doctrine (which bars a cause of action where a conspiracy is alleged between a corporation and its employees) to a § 1985(3) claim by establishing a *prima facie* case alleging conduct outside the scope of employment. Courts have held that such a showing can be made through facts claiming actions by corporate employees "on their own behalf", "with

personal racial animus" or, by acts with an "independent personal stake," *Garza v. City Of Omaha*, 814 F.2d 553, 557 (CA. 8, 1987); *Nieto v. United Auto Workers Local 598*, 672 F. Supp. 987, 993 (E.D. Mich. 1987); *Mason v. Twenty-Sixth Judicial District of Kansas*, 670 F. Supp. 1528 (D. Kan. 1987). Despite the instances where the individual Respondents made racially charged remarks against Petitioner, the Sixth Circuit reasoned that "it is clear that their comments were connected to the legitimate business of Hills & Dales General Hospital and the work of its staff." However, Petitioner fails to see how comments to Dr. Johnson, to "take her black ass back to where she came from" has the least bit to do with a legitimate business purpose. Moreover, the Sixth Circuit dismissed as irrelevant, the factual allegations in this case that many of the comments made against Petitioner by the Respondents were not true, or beyond their qualification. For example, Petitioner established that while Rhonda Hume and Doris Donahue were clearly not qualified to determine what tests are appropriate for patients, they nevertheless criticized Petitioner's frequency of testing patients as excessive. Moreover, Jon C. Fahrner, head of Hills & Dales laboratory and qualified to comment on the number of tests ordered by Dr. Johnson, concluded that her testing was not excessive, but rather "appropriate."

Petitioner contends that when addressing issues of race discrimination, the court must be sensitive to the realities of such litigation. Seldom does a litigant have a factual "smoking gun" to point to in proving their case. More often than not, such cases are made on the strength of a slip of the tongue and circumstantial evidence. Care must therefore be taken not to disregard competent evidence of "personal racial animus," even when it consists of but a few items of proof. It is therefore, very significant that an agent of Hills & Dales found no merit in the Respondents' numerous claims that Petitioner was requiring them to work excessively. Clearly, if it can be shown that at least

one of the conspirators expressed open racial hostility toward Dr. Johnson and others made baseless accusations about her supervisory skills, one may infer that they were motivated by considerations other than a "legitimate business purpose."

Since much of the court's analysis of a discrimination case has to do with the actors' state of mind, whether one makes a false statement in good faith or does so with a wilful disregard for the truth can be pivotal to the proofs. It would appear, then, that the Sixth Circuit was willing to conclude on its own accord that even if the Respondents falsely stated facts against the Petitioner, they did so in good faith. That rationale is flawed because the circuit court offers absolutely no authority for it and because the court thrust itself into the realm of fact finder. It is far beyond the role of the court on a motion for summary judgment to decide the facts for, or against one party or the other. Here, the circuit court dismissed the racial comments as either untrue or insignificant and offered an excuse for the Respondents' proven false statements about Dr. Johnson's performance. Thus, the decision of the Sixth Circuit is rendered erroneous .

Moreover, the circuit court incorrectly held that all comments made by the Respondents were made "during the course of their working hours" and were therefore protected. This is clearly not the test in determining whether the intra corporate doctrine is avoided. If it were, all an employee would have to do is make their racially charged comments *while at work* and thereby avoid liability. The circuit court correctly pointed out in its opinion elsewhere that the proper test is whether the actions sued upon were *within the scope of one's employment, Dougherty v. American Motors, Corp.*, 728 F.2d 334 (CA. 6, 1984). Stated another way, the question is did the employee have the express or implied authority to make the comment or commit the act? Right away, one must admit that Hills & Dales Hospital did not place comments such as "get your black ass back to where you came

from," within the scope of its employee's authority. Nor did it vest lower level lab technicians such as Dale Weidman and Theresa Deering with authority to exceed their training and falsely allege that a doctor is requesting too many tests. The scope of employment issue might have been settled against Petitioner were it not for the testimony of Mr. Farhner who stated that not only were Dr. Johnson's testing levels appropriate but, that she was an excellent doctor. More importantly perhaps, the Respondents themselves admitted that they were not qualified to determine when or whether a doctor's level of testing was wrong. Consequently, we are left with the inescapable conclusion that an objective review of the facts supporting Petitioner's claims of race discrimination should have resulted in a denial of Respondents' motion for summary judgment.

The Sixth Circuit similarly erred in agreeing with the lower court that the Respondents, in signing the memo "were expressing concerns about their provisional responsibility or absence of it, in their view, of this physician." None of the Respondents testified to that. In fact, Weidman expressly stated that quality of care was not an issue. His alleged purpose in signing the memo was to get his work-load reduced. Similarly, Donahue's claimed purpose in signing the memo was to avoid being called in on weekends by Dr. Johnson. Respondent Hume, who initiated the memo and recruited the others to sign it was "sure, firing Dr. Johnson would be one thing" which could occur. She admittedly has used racial slurs to refer to African Americans. It is not unreasonable to conclude that, to obtain their signatures, Hume convinced the others that their signatures would ensure the firing of Dr. Johnson, thereby allowing them to reach their objectives of not working for an African American. Yet, the testimony of their supervisor revealed that Dr. Johnson was working them the same as any other doctor. Finally, although he denies it, Jensen informed the Mastercare representative that Dr. Johnson was being let go due to her race.

Thus, there is sufficient evidence in the record that some employees had personal discriminatory reasons in acting outside the scope of their employment to deprive Dr. Johnson of her protected rights. *See Mason*, *supra*, at 1534 (a motion for dismissal and/or summary judgment on a § 1985(3) claim is denied where the complaint specifically alleges that defendants were acting in their individual capacities as employees who were motivated by personal racial bias and not acting out of a concern for the best interest for their employer).

An important aspect of the memo, not addressed by the circuit court is that its language contains coded veiled comments that are racially motivated. The first sentence of the memo stated, "Hills & Dales is 'our' hospital in 'our' community." This is typical language use by prejudiced people intended to support racial exclusivity. The significance of this sentence is best illustrated by the fact that the community in which the hospital operates has but one African American resident. It can be fairly presumed therefore, that "our" has reference to the residents of the community who are *not* racial minorities.

The record below was replete with direct and circumstantial evidence tending to show that despite the intra corporate doctrine, the individual employees were motivated by personal racial animus, on their own behalf or, they acted with an independent personal stake in the corporate action. Had the facts been viewed in a light most favorable to the Petitioner, the motion for summary judgment would have been denied. This is because the record did support an issue for trial. Instead the circuit court acted as a super jury and decided the facts against the Petitioner. This was reversible error.

Petitioner submits that certiorari should be granted because the Sixth Circuit's judgment departed from the accepted and usual role to be performed by a court on motions for summary

judgment. This case should have proceeded to trial on the merits. This Honorable Court should reject the Court of Appeals' insistence on being a fact finder.

## II.

## CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS RELATIVE TO THE APPLICATION OF THE INTRA CORPORATE CONSPIRACY DOCTRINE TO THE 42 U.S.C. § 1985(3) CONSPIRACY PROVISION.

There exits among the circuits of the federal judicial system a conflict as to whether the intra corporate doctrine should apply to § 1985 (3) claims when a corporation is sued, unless an exception to the rule can be found. The Sixth Circuit has ruled in two recent cases that the doctrine does apply. Unfortunately, those decisions, *Hull v. Cuyahoga Valley Bd. of Ed.*, 926 F.2d 505 (CA. 6, 1991) and *Dougherty v. American Motors*, 728 F.2d 334 (CA. 6, 1984), were either decided without true legal analysis to the issue or engrafted the doctrine on to the civil rights statute, even though the facts of that case did not apply to § 1985(3). The *Dougherty* decision, for example involved a 42 U.S.C. § 1985(2) claim, which is quite a bit different from a § 1985(3) cause of action.

There is a significant difference in the purposes underlying § 1985(2) claims and § 1985(3) claims. The portion of § 1985(2) which was at issue in *Dougherty* contains no requirement that the conspirators acted with intent to deprive their victims of the equal protection of the laws; its sole purpose is to prevent the interference with the administration of justice in federal courts, irrespective of racial or class based invidiously discriminatory animus, *Kush v. Rutledge*, 460 U.S. 719, 103 S. Ct. 1483, 75 L. Ed. 2d 413 (__).

Conversely, 42 U.S.C. § 1985(3) requires an intent to deprive of equal protection motivated by racial, invidiously discriminatory animus behind the conspirators' actions, *Bray v. Alexandria Women's Health Clinic*, ___ U.S. ___, 113 S. Ct. 753, 759, 122 L. Ed. 2d 34 (1993). "The predominate purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters," *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 103 S. Ct 3352, 3360, 77 L. Ed. 2d 1049 (1983). Section 1985(3) should be accorded "a sweep as broad as (its) language," *Griffin v. Breckenridge*, 403 U.S. 88, 92 S. Ct. 1790, 1796, 29 L. Ed. 2d 338 (1971).

Neither the *Hull* court, nor the *Dougherty* court provided any reasoned analysis or support for limiting the scope of § 1985(3) by engrafting the intra corporate conspiracy doctrine on to this statute. The purpose of the doctrine, borne in antitrust law, was to promote competition, *Copperweld Corp v. Independence Tube Corp*, 467 U.S. 752, 104 S. Ct. 2731, 2740-2743, 81 L. Ed. 2d 628 (1984). The Supreme Court noted that vigorous competition, which is at the base of our free market economy, is dependent upon the ability of firms to execute unitary corporate policy and therefore concluded that concerted action within a firm or between a firm and its wholly owned subsidiary is not constrained by section 1 of the Sherman Act, *Id.* The doctrine's purpose is in no way served by applying the doctrine to civil rights laws.

Many other courts have acknowledged that no social benefit flows to society, but, to the contrary, *inequality is perpetuated* when the intra corporate conspiracy doctrine is used to bar claims under § 1985(3). *See Stathos v. Bowden*, 728 F.2d 15, 21 (CA. 1, 1984), ("where 'equal protection' is at issue, however, one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several. Nor can one readily identify desirable social conduct as typically

engaged in jointly by the officers of a single enterprise. Thus, the boundaries of an 'intra corporate' exception to the § 1983(5) conspiracy provision should be narrower than in antitrust"); *Novotony v. Great Am Federal Sav. & Loan Ass'n*, 584 F.2d 1235, 1257 (CA. 3, 1978), ("we see nothing in the policies undergirding § 1985(3) that would support the application of the intra corporate doctrine. If, as seems clear under § 1985(3), the agreement of three partners to use their business to harass any blacks who register to vote constitutes an actionable conspiracy, we can perceive no function to be served by immunizing such action once a business is incorporated"); *An-Ti Chai v. Michigan Technological University*, 493 F. Supp. 1137, 1166 (1980), (holding that the rule makes no sense where numerous and varied acts of discrimination by several persons are committed against the plaintiff in a corporate setting); *Washington v. Duty Free Shoppers*, 696 F. Supp. 1323, 1326 (1988), ("in the area of civil rights, a real danger exists from the collaboration among agents of a single business to discriminate. There is no reason to believe that discrimination by an individual business is less harmful than discrimination by multiple businesses, or that discrimination by a single business deserves to be protected because it confers any benefit on society ) and *Rebel Van Lines v. City of Compton*, 663 F. Supp. 786, 792 (1987), (unlike the area of antitrust, where actions by a single business are presumed to be pro-competitive and therefore beneficial to society, there is no reason to believe that discrimination by an individual business is less harmful than discrimination by multiple businesses, or that discrimination by a single business deserves to be protected because it confers any benefit on society").

Admittedly, the Sixth Circuit has chosen to apply the intra corporate conspiracy doctrine to § 1985(3) claims. However, the reasoning of the afore-cited cases is clearly more applicable in view of the purposes of the doctrine and of § 1985(3). This is particularly true in light of the fact that the Sixth Circuit gave

*absolutely no reasoning* for adopting the intra corporate conspiracy doctrine for application in civil rights claims. In fact, the Fifth Circuit which the *Dougherty* court relied upon, has itself not extended the doctrine to § 1985(3) claims, *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (CA. 5, 1981). In so refusing, the *Dussouy* court stated, "in these situations, the action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose," *Dussouy* at 603.

The facts of the case at bar are the very matters that the circuits rejecting the intra corporate doctrine have sought to redress. The *Hull* and *Dougherty* decisions, however, ignore the spirit and intent of both the intra corporate doctrine and § 1985(3). It simply makes no sense to arm a federal statute with the power to combat organized discrimination and then remove its teeth by making it inapplicable to the very institutions that have discriminated against minorities most notoriously. This Honorable Court is well aware of the theory of the "glass ceiling," in place to keep minorities from rising too high in the corporate world. This transparent barrier to progress is easier to perpetrate if the corporation simply must couch it's employee's discriminatory conduct within the scope of their authority. Furthermore, offering a civil rights litigant the hurdle of proving acts outside the scope of employment is tantamount to no remedy, since the Sixth Circuit takes the position here that internal corporate decisions would almost always be within the scope of employment. Thus, all a corporate official or employee need do, is use the magic phrase "internal corporate decision" and the Sixth Circuit, at least, will undoubtedly uphold the conduct, regardless of how egregious it may be.

Curiously the Sixth Circuit engaged in no real historical or legislative analysis of § 1985(3). If it had it would have had to

address the very early case of *Pennsylvania R.R. System, Inc. v. Pennsylvania R. Co.*, 267 U.S. 203, 45 S. Ct. 307, 69 L. Ed. 574 (1925), where the issue of a corporate conspiracy to violate Title 3 of the Transportation Act of 1920 was addressed. In that case, this Honorable Court analyzed whether the conspiratorial denial of due process and equal protection to the corporation's rail employees was actionable. This Court was so convinced that conspiracies by corporations are actionable, it was never made an issue by the parties or the Court. This Court said:

> The *whole issue,* therefore, is whether the provisions of Title 3 in pointing out what Congress wished the parties to the dispute to do, was intended by Congress to be a positive, obligatory law, creating an enforceable duty such that a combination by the company and its officials to violate it is a conspiracy. *Id.* at page 210.

In other words, the issue at no time was whether a conspiracy could be committed by the corporation but rather, whether it was obligated to obey Title 3 or could violate it in its discretion.

## CONCLUSION

One would have to conclude, therefore, that the highest Court of the land has indeed, provided a clue to whether the intra corporate doctrine should bar redress of federal statutes. Petitioner maintains that it would be illogical to conclude that this Court would wish to see an inconsistent application of this doctrine. Why would this Honorable Court abandon the intra corporate doctrine as to some federal statutes and not do so as to others? Of course, there is no good reason to suppose, that would be this Court's approach; which makes it important for certiorari to be granted in this case to settle the conflict that has persisted among the circuits on this issue.

Application of the intra corporate doctrine undermines the very purpose of 42 U.S.C. § 1985(3). This position is taken by several Courts of Appeal. For this reason, Petitioner submits that this Honorable Court should resolve the conflict.

Respectfully submitted,

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## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED NOVEMBER 16, 1994

No. 93-1854

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VIVIAN JOHNSON,

Plaintiff-Appellant,

v.

HILLS & DALES GENERAL HOSPITAL, et al.,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed November 16, 1994

Before: MILBURN, DAUGHTREY, and WEIS*, Circuit Judges.

WEIS, Circuit Judge. Because a corporation cannot conspire with itself, employees of the company generally cannot be liable for a conspiracy under the Civil Rights Act, 42 U.S.C. § 1985(3). In this appeal, we conclude that an exception to that rule exists when the challenged activity takes place outside the course of

---

* The Honorable Joseph F. Weis, Jr., Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

employment. In this case, the evidence does not establish that the employees' conduct meets that standard, and therefore, we will affirm the district court's grant of summary judgment to defendants.

I.

Plaintiff, a black physician, was employed by the MasterCare Corporation, a company that provides hospitals with physicians to staff emergency rooms. Although the physicians work in the hospital, they remain employees of MasterCare and their assignments may be terminated at the hospital's request.

Under this arrangement, plaintiff worked at defendant Hills & Dales General Hospital for a number of weekends in the period between October 1989 and April 1990 During this time, she experienced some hostility from various hospital employees and was subjected on one occasion to a derogatory racial remark. The employees complained that plaintiff ordered excessive diagnostic testing and that she unnecessarily called in employees for weekend assignments. They also criticized the plaintiff's professional competence and, ultimately, wrote a letter to the hospital administration complaining about her performance. Based on this letter indicating discord between the staff and plaintiff, the hospital president asked MasterCare to assign a different physician to the Hills & Dales emergency room.

Asserting that she had been reassigned because of racial discrimination, plaintiff sued the hospital, its president, and the members of the staff who had been critical of her. The complaint asserted claims arising under state law and various federal civil rights statutes, including allegations of a conspiracy under 42 U.S.C. § 1985(3). The district court entered summary judgment for defendants on all counts.

*Appendix A*

In ruling on the section 1985(3) charge, the district court did not deem it necessary to determine whether the statements of the staff were false, because there could not have been an actionable intra-corporate conspiracy in any event. As the court observed, "There simply are not two people which would be required for a conspiracy. That fails and everything else falls away into unimportance. . . ." Conceding the possibility of an exception to the intra-corporate conspiracy rule, the court continued:

> "The only possible exception to that is if people are off doing things which are palpably beyond the scope of their employment. The falsity alleged by the plaintiff of these statements that were made in this petition is not of a character to allow any court to determine that these statements were made beyond the scope of the employment responsibilities . . . The statements were made within the scope of that employment situation and that defeats, in and of itself, the claim of conspiracy in the [section 1985] claim."

Plaintiff has appealed, but she limits her challenge to the ruling on the conspiracy count.

We review a district court's grant of summary judgment de novo. *Brooks v. American Broadcasting Cos.*, 932 F.2d 495, 500 (6th Cir. 1991). Summary judgment is appropriately granted if the record developed through discovery shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

*Appendix A*

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), the Court stated that the moving party may meet its burden by showing that there is an absence of evidence to support the nonmoving party's case. The nonmoving party must do more than merely present its own pleadings and affidavits. *Ashbrook v. Block*, 917 F.2d 918, 921 (6th Cir. 1990). As the Supreme Court remarked in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986), "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."

II.

To establish a claim under 42 U.S.C. § 1985(3),[1] a plaintiff

---

1. Section 1985(3) reads:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States; or to injure any citizen in person or property on

(Cont'd)

must prove (1) a conspiracy involving two or more persons (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherance of the conspiracy (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson,* 30 F.3d 649, 652-53 (5th Cir. 1994). Plaintiff must also establish that the conspiracy was motivated by a class-based animus. *Id.* at 653.

This Court has held that in cases brought under section 1985(3), a corporation cannot conspire with its own agents or employees. In *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F. 2d 505, 510 (6th Cir. 1991), we stated: "[I]f all of the defendants are members of the same collective entity, there are not two separate 'people' to form a conspiracy." This holding is generally labeled the "intracorporate conspiracy" doctrine. Although the precept is frequently discussed in the antitrust field, *see e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) and *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), it is also applied in cases alleging civil rights conspiracies. *See e.g., Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 431 (3d Cir. 1988);

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(Cont'd)

> account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

*Buschi v. Kirven*, 775 F.2d 1240, 1251-52 (4th Cir. 1985); *Doherty v. American Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984); *Gerard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 70-72 (2d Cir. 1976); *Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974). *But see Stathos v. Bowden*, 728 F.2d 15, 21 (lst Cir. 1984); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n.*, 584 F.2d 1235, 1257 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979) (Supreme Court assumed but expressly withheld decision on the application of the intracorporate conspiracy doctrine to section 1985(3)).

The intracorporate conspiracy doctrine, if applied too broadly, could immunize all private conspiracies from redress where the actors coincidentally were employees of the same company. Aware of this possibility, courts have created a "scope of employment" exception that recognizes a distinction between collaborative acts done in pursuit of an employer's business and private acts done by persons who happen to work at the same place.

In *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972), the Court held that a claim under section 1985(3) is not established "if the challenged conduct is essentially a single act of discrimination by a single business entity." The mere "fact that two or more agents participated in the decision or in the act itself will normally not" suffice to create a conspiracy. *Id.* The *Dombrowski* Court commented that it did not mean to "suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding." *Id.*

The same Court of Appeals clarified its *Dombrowski* holding in *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108 (7th Cir. 1990). That case reiterated that "managers of a

corporation jointly pursuing its lawful business do not become 'conspirators' when acts within the scope of their employment are said to be discriminatory or retaliatory." *Id.* at 110. *Travis* also held that "[s]ection 1985 depends on multiple act*ors*, not on multiple *acts*. . . ." Hence, "it does not matter whether the corporate managers took multiple steps to carry out their plan. . . ." *Id.* at 111.

Another Court of Appeals discussed a limitation to the intracorporate conspiracy doctrine in *Garza v. City of Omaha*, 814 F.2d 553 (8th Cir. 1987). There, the Court held that a section 1985 "intracorporate conspiracy may be established where individual defendants are also named and those defendants act outside the scope of their employment for personal reasons." *Id.* at 556.

In *Hartman v. Board of Trustees of Community College Dist. No. 508, Cook County, Ill.*, 4 F.3d 465, 470 (7th Cir. 1993), the Court questioned whether it was appropriate to hold corporate agents liable under section 1985(3) when their actions within the scope of employment were prompted, only partially, by personal racial animus. The *Hartman* Court concluded that a conspiracy could only be established if the employees' actions were solely the result of personal bias. *Id.*

The corporation's mission is also a substantial factor to be considered. A corporation formed for the purpose of depriving citizens of their civil rights would not be shielded by the intracorporate conspiracy doctrine. *As Dombrowski, Hartman,* and *Travis* make clear, members of the Ku Klux Klan could not avoid liability by incorporating.

Finally, corporate actors might be beyond the scope of their

employment where the aim of the conspiracy exceeds the reach of legitimate corporate activity. Courts should be wary of situations in which corporate actors try to interfere with a plaintiff's access to public benefits or those of other entities. For example, a manufacturing corporation's employees might not be within the intracorporate conspiracy exception if, for racially discriminatory reasons, they attempted to prevent a person from renting an apartment owned by another company. That type of activity would be quite different from internal corporate decisions, which would almost always be within the scope of employment.

We have no occasion in the case before us to consider any exception to the intracorporate conspiracy doctrine other than that relating to scope of employment. After a careful review of the authorities, we hold that when employees act outside the course of their employment, they and the corporation may form a conspiracy under 42 U.S.C. § 1985(3).

III.

In the case before us, plaintiff facially attacks the holding of *Hull* and, alternatively, argues that the individual defendants were acting beyond the scope of their employment. We are bound by the Hull holding under our internal operating procedures and thus decline the plaintiff's invitation to overrule that case. Consequently, the scope of employment issue is the only one that we may consider at this juncture.

Plaintiff contends that because a number of employees lacked the training and competence to question her medical judgment, their discussions on that score were beyond the scope of their employment responsibilities. Even if the employees lacked the necessary qualifications to prescribe proper medical

treatment, that however, does not establish that they acted outside the course of their employment. It is clear that their comments were connected to the legitimate business of Hills & Dales General Hospital and the work of its staff. Whether the criticism was based on professional knowledge does not determine its relationship to the corporation's proper concerns.

Plaintiff asserts further that, in addition to racial bias, the employees wished to have her assigned to another hospital so that they would not have to work so hard. Even so, plaintiff has failed to overcome the facts that the employees' complaints were made during the course of their working hours, the remarks were connected to the business of the hospital, and they were forwarded to the proper managerial authorities. These factors need not be necessary guideposts in every case alleging activity beyond the scope of employment, but they are surely present here.

Finally, plaintiff argues that employee complaints containing rumors and falsehoods are per se beyond the scope of employment. As the trial judge remarked, it is not necessary that the complaints were based on fact — it is enough that they were directed to conditions that affected patient care and the morale of the hospital staff. In like vein, the hospital president's decision to request that plaintiff not be returned to the hospital in the future, based on the unrest she caused among the staff members, was obviously a legitimate managerial decision.

We conclude that plaintiff has failed to establish that the individual defendants acted outside the course of their employment. Therefore, the intracorporate conspiracy rule applies. Because plaintiff has failed to persuade us that an actionable conspiracy under 42 U.S.C. § 1985(3) existed, the judgment of the district court will be affirmed.

## APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED NOVEMBER 16, 1994

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 93-1854

VIVIAN JOHNSON,

Plaintiff-Appellant,

v.

HILLS & DALES GENERAL HOSPITAL, et al.,

Defendants-Appellees.

Before: **Milburn, Daughtrey**, and **Weis**, Circuit Judges

### JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan at Bay City.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

*Appendix B*

A True Copy.

Attest:

_____

Deputy Clerk

Issued as Mandate: 12-08-94

COSTS: None

Filing Fee .....$
Printing ..... $

Total .....$

## APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION DATED MAY 11, 1993

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case No: 91-CV-10482-BC

VIVIAN JOHNSON, M.D.,

Plaintiff,

v.

HILLS & DALES GENERAL HOSPITAL et al.,

Defendants.

### JUDGMENT

In accordance with the Order Granting Defendants' Motion for Summary Judgment entered this date,

IT IS ORDERED AND ADJUDGED that judgment be, and hereby is **GRANTED** in favor of Defendants and against Plaintiff; and

IT IS FURTHER ORDERED AND ADJUDGED that this action is **DISMISSED.**

IT IS SO ORDERED.

*Appendix C*

s/ Robert H. Cleland

ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

DATED: May 11, 1993

(2)

Supreme Court, U.S.
FILED
MAR 16 1995
OFFICE OF THE CLERK

No. 94 1435

In The

# Supreme Court of the United States

October Term, 1994

VIVIAN JOHNSON, M.D.,
*Petitioner,*

v.

HILLS & DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, KEN JENSEN, RHONDA HUME, THERON MIDDAUGH, CRAIG BELLEW, TOM OESCH, JOANN BROWN AND CINDY KLAUS,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR RESPONDENTS

*AND APPENDICES*

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## QUESTIONS PRESENTED

I

WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE INTRA-CORPORATE CONSPIRACY DOCTRINE IS APPLICABLE TO CLAIMS ASSERTED UNDER 42 U.S.C. § 1983?

II

WHETHER THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE SIXTH CIRCUIT CORRECTLY FOUND THAT THE INTRA-CORPORATE CONSPIRACY DOCTRINE APPLIES AS THE RESPONDENT/EMPLOYEES WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner Vivian Johnson, M.D. and the Respondents Hills & Dales General Hospital, Theresa Deering, Dale Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew and Tom Oesch.[1] Three individuals who were originally named as defendants, who are named as Respondents on plaintiff's Petition for Writ of Certiorari were dismissed from this lawsuit with prejudice pursuant to plaintiff's stipulation. These individuals are Myryka Weidman, Joann Brown, and Cindy Klaus.

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1 **There are no parent or subsidiary companies.**

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No. 94 1435

In The

# Supreme Court of the United States

October Term, 1994

VIVIAN JOHNSON, M.D.,

*Petitioner,*

v.

HILLS & DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, KEN JENSEN, RHONDA HUME, THERON MIDDAUGH, CRAIG BELLEW, TOM OESCH, JOANN BROWN AND CINDY KLAUS,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR RESPONDENTS

### OPINIONS BELOW

The order of the District Court for the Eastern District of Michigan granting summary disposition in favor of Respondents was entered on May 11, 1993. This order is attached as Appendix C to Petitioner's brief. The Sixth Circuit Court of Appeals upheld the district court's dismissal in an opinion and an order of judgment filed on November 16, 1994. The opinion and order of judgment entered by the Sixth Circuit Court of Appeals is attached as Appendix A and B to Petitioner's brief.

### COUNTER-STATEMENT OF THE CASE

Respondents provide the following additional statement of the case as Petitioner's statement of the facts is

inaccurate, misleading and erroneous. In addition, Petitioner fails to cite to or attach as an Appendix any authority from the lower court record to support her statement of the facts.

For purposes of this Response to the Petition for Writ of Certiorari, Respondents rely upon the statement of facts as set forth in the Sixth Circuit Court of Appeals' decision (see Petitioner's Appendix A, p. 1a) which is supplemented, where necessary below.

District Court Judge Robert E. Cleland entered an order of summary judgment on May 6, 1993, dismissing Petitioner's five count complaint which alleged various civil rights violations. Petitioner on appeal challenged only the trial court's ruling and dismissal as to one count which alleged a violation of 42 U.S.C. § 1985(3). In granting summary judgment, the district court found the requisite conspiracy for a claim under 42 U.S.C. § 1985(3) could not be established by virtue of the so-called "intra-corporate conspiracy doctrine". The district court further rejected Petitioner's argument that an exception to the intra-corporate conspiracy rule existed because the individual defendants allegedly acted outside of the scope of their employment.

The Sixth Circuit Court of Appeals, in its November 16, 1994, opinion affirmed the district court's order of summary judgment. In so concluding, the Court of Appeals agreed with plaintiff and concluded that an exception to the rule that a corporation cannot conspire with itself exists "when the challenged activity takes place outside the course of employment." (See Petitioner's Appendix A, pp. 1a-2a.) However, the Court further found that, in this case, "the evidence does not establish that the employees' conduct meets that standard." *Id.*

As the Court of Appeals found, the plaintiff was employed at MasterCare Corporation which provided

hospitals with physicians to staff emergency room facilities (see Petitioner's Appendix A, p. 2a). Petitioner worked weekends at Hills & Dales General Hospital as an independent contractor intermittently between approximately October 1989 and April of 1990 (see Petitioner's Appendix A, p. 2a). At the request of the hospital, MasterCare ceased to schedule Petitioner at the hospital as of April 16, 1990 (see Appendix A, R. 79: Petitioner's Dep., p. 47, *infra* at A-1-A-2).

Rhonda Hume, Doris Donahue, Dale Weidman and Theron Middaugh addressed concerns they had regarding Petitioner in a memorandum to their immediate supervisors and to Ken Jensen, President of the Hospital (See Appendix B, R. 79: Employee Statement Regarding Dr. Johnson, *infra* at B-1-B-3). In that memo, it was specifically stated that the concerns of these employees were employment related:

> "As valued employees of Hills & Dales, our interests lie primarily in obtaining the best medical care for our patients. However, hospital reputation, cost containment and employee moral are also major concerns.
>
> Since there are serious doubts that Dr. Johnson amongst employees, administration and supervisors should consider trusting in the instincts of their hospital staff, and the misgivings concerning Dr. Johnson."

The President of the Hospital Ken Jensen testified that while he believed that Petitioner was a good physician, there was turmoil at the Hospital which adversely affected employee moral. He testified that this was the basis for his decision to request that MasterCare no longer schedule Petitioner at Hills & Dales General Hospital (see Appendix C, R. 79 and 97: Jensen Dep., pp. 40-42, 45, *infra* at C-1-C-4).

Petitioner has filed a Petition for Writ of Certiorari with this Court seeking review of the United States Court of Appeals for the Sixth Circuit's decision in this case. Respondents submit the following as their Response to the Petition.

## REASONS FOR DENYING THE WRIT

### I.

### THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE INTRA-CORPORATE CONSPIRACY DOCTRINE IS APPLICABLE TO CLAIMS ASSERTED UNDER 42 U.S.C. § 1983.

Summary judgment was properly granted dismissing the plaintiff's claims of a civil rights conspiracy because a corporation cannot conspire with itself and because employees of a corporation cannot, generally, be held liable for such an alleged conspiracy. Respondents submit that any alleged conflict among the circuits over the applicability of the intra-corporate conspiracy doctrine to 42 U.S.C. § 1985 claims does not merit review by this Court — first, because, as the Sixth Circuit concluded, the doctrine is applicable to § 1985 claims, and second, because the effects of the doctrine to § 1985 claims will affect a very small number of claimants.

The Sixth Circuit Court of Appeals has applied the general rule that a corporation cannot conspire with itself and that, thus, the intra-corporate conspiracy doctrine is applicable to claims asserted under 42 U.S.C. § 1983. See *Doherty* v. *American Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984); *Hull* v. *Cuyahoga Valley Bd of Educ*, 926 F.2d 505, 509 (6th Cir. 1991), *cert. den.* 501 U.S. 1261 (1991). This doctrine, as adopted by the Courts in *Doherty* and *Hull*, was articulated by the Fifth Circuit in

*Nelson Radio & Supply Co., Inc.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. den.* 345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356 (1953), a case alleging anti-trust violations, as follows:

> "It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."

In *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L. Ed. 2d 628 (1984), this Court affirmed the validity of the intra-corporate conspiracy doctrine under the Sherman Act stating "officers or employees of the same firm do not provide the plurality of actors imperative for a section one [15 U.S.C. § 1 conspiracy]." 81 L. Ed. 2d at 642.

In *Hull, supra*, the plaintiff alleged a conspiracy between a school district superintendent, the executive director of the district, and a school administrator, all of whom were employees or agents of the school board who the plaintiff alleged discriminated against her based on her race. 926 F.2d at 510. In *Hull*, the Sixth Circuit concluded that the conspiracy claim failed because there were "not two separate 'people' to form a conspiracy." *Hull*, at 510.

In *Doherty, supra*, the Sixth Circuit Court of Appeals found this doctrine was applicable in a case which alleged a conspiracy solely among agents, including legal counsel, of a corporation. 728 F.2d at 339.

The individual Respondents in this case include an administrator, supervisors, and employees of the hospital comprising a single legal entity, as in *Doherty* and *Hull, supra*. All actions which allegedly constituted the

conspiracy took place at Respondent hospital while the Respondents were engaged in the business of the hospital. Respondents constitute a single legal entity incapable of entering into a conspiracy. Petitioner failed to plead, and could not prove the requisite "two or more persons" necessary for a conspiracy. For this reason, Petitioner's conspiracy claims were properly dismissed as a matter of law and Respondents properly were granted summary judgment.

Several other circuit courts, as noted by the Sixth Circuit, have applied the intra-corporate conspiracy doctrine to civil rights conspiracy claims: *Herrmann* v. *Moore*, 576 F.2d 453 (2d Cir. 1978), *cert. den.* 439 U.S. 1003 (1978); *Girard* v. *94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70 (2d Cir. 1976), *cert. den.* 425 U.S. 974 (1976); *Baker* v. *Stuart Broadcasting Co.*, 505 F.2d 181 (8th Cir. 1974); *Dombrowski* v. *Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Runs After* v. *United States*, 766 F.2d 347 (8th Cir. 1985); *Buschi* v. *Kerven*, 775 F.2d 1240 (4th Cir. 1985); *Garza* v. *City of Omaha*, 814 F.2d 553 (8th Cir. 1987); *Zombro* v. *Baltimore City Police Department*, 868 F.2d 1364, 1371 (4th Cir. 1989), *cert. den.* 493 U.S. 850 (1989); *Robison* v. *Canterbury Village, Inc.*, 848 F.2d 424 (3rd Cir. 1988).[2] In all of these decisions, the Court of Appeals for each of these circuits has applied the intra-corporate conspiracy doctrine to civil rights allegations under 42 U.S.C. § 1985.

In *Herrmann*, the Second Circuit Court of Appeals applied this doctrine to a claim by the plaintiff therein that his discharge as a tenured facility member of the defendant educational institution was the result of a

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[2] **This principle has been applied in cases other than claims under § 1985. See *Davis & Cox* v. *Summa Corp.*, 751 F.2d 1507, 1526 (9th Cir. 1985); *Marmott* v. *Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986), *cert. den.* 482 U.S. 929 (1987).**

conspiracy directed at him by the school, its trustees and certain of its faculty. The Second Circuit Court affirmed the dismissal of the § 1985 action stating:

> "Every one of the defendants who was involved in the so-called conspiracy was either a trustee or faculty member of the Brooklyn Law School — which is admittedly an educational corporation — and was acting in that capacity in connection with the discharge."
>
> * * *
>
> "Inasmuch as in the case at bar the complained-of injury was the discharge of plaintiff by the corporation, and inasmuch as each of the persons shown to have any purpose to further the discharge was the trustee or employee of the corporation and acting for it, we agree with the District Judge's conclusion that with respect to plaintiff's claim based on 42 U.S.C. § 1985(2) defendants were entitled to summary judgment." 576 F.2d at 459.

In *Buschi, supra*, the Fourth Circuit Court of Appeals further stated that the immunity granted under the intra-corporate conspiracy doctrine is not destroyed because agents are sued individually, stating:

> "Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiffs must also allege that they acted other than in the normal course of their corporate duties." 775 F.2d at 1252, quoting *Kole* v. *University of Hartford*, 391 F. Supp. 888, 893 (D.Conn. 1975).

Other circuits which have addressed the issue have also found, as the Sixth Circuit Court of Appeals found

in this case, that an exception to this doctrine exists when the challenge activity takes place outside the course of employment. See *Buschi*, *supra*, at 1252; *Garza*, *supra*, 556; *Girard*, *supra*, at 71.

As Petitioner notes in her petition, some circuits have held that the intra-corporate conspiracy doctrine is inapplicable. See *Novotny* v. *Great Am Federal Sav. & L. Ass'n*, 584 F.2d 1221, 1256 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 336 (1979); *Stathos* v. *Bowden*, 728 F.2d 15, 20 (1st Cir. 1984).

Respondents respectfully submit that such cases were incorrectly decided and that, contrary to petitioner's assertions and these circuit courts' conclusions, the intra-conspiracy doctrine was properly applied in this case.

The basic premise of the law governing corporations is that a corporation must act through its agents and employees. Since the acts of the agents are the acts of the corporation, the corporation cannot conspire with itself. If this were not the rule, acts by two or more employees and/or agents of a corporation would always amount to a conspiracy.

Even the Third Circuit in a decision subsequent to the *Novotny*, *supra*, case have applied the intra-corporate conspiracy doctrine to § 1985 claims. In *Robison*, *supra*, the Third Circuit Court of Appeals noted that, in its opinion, it only held in *Novotny* that officers and directors of a corporation can conspire with each other for purposes of § 1985(3) and had "no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself." 848 F.2d at 431. The Court went on to state the proposition adopted (by what respondents believe is the majority of jurisdictions) that a conspiracy cannot arise between a corporation and its officers. In addition, the *Robison* Court noted the excep-

tion adopted by the Sixth Circuit in this case, that a conspiracy claim under § 1985(3) can be maintained "if the officer is acting in a personal, as opposed to official, capacity, or if independent third parties are alleged to have joined the conspiracy." *Id.* After stating these propositions, the Third Circuit affirmed the district court's order of dismissal, noting that the plaintiff had made no allegation of any conspiracy beyond that of the corporate officer conspiring with the corporation in his corporate capacity. *Id.*

Application of the intra-corporate conspiracy doctrine will not eliminate a claimant with a valid cause of action from alternative remedies. Section 1985(3) provides no substantive rights in itself, but rather is a purely remedial statute providing a cause of action when a defined federal right — namely, the equal protection of the laws or its privileges and immunities under the laws — is breached by a conspiracy. Among the remedies that may exist for a claim of racial discrimination, in addition to remedies under state laws and state constitutions, are those contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*, as well as under other general civil rights statutes such as 42 U.S.C. §§ 1981 and 1986. In fact, the Petitioner in this case did initially allege civil rights violations under 42 U.S.C. §§ 1981 and 1986.

Further, respondents respectfully submit that this issue is not one to resolve the conflict between the circuits. The issue as presented to the Court in this case is not one which will affect very many potential claimants. Further, as set forth in Argument II, the facts in this case clearly establish that there was no discrimination against Petitioner on the basis of her race.

Respondents respectfully submit that the Sixth Circuit correctly applied the intra-corporate conspiracy doc-

trine to plaintiff's claims under 42 U.S.C. § 1983(3) and that this rule, which Respondents believe is the majority view, is the proper reasoned approach to conspiracy claims under 42 U.S.C. § 1985(3).

## II.

## THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AS THE SIXTH CIRCUIT CORRECTLY FOUND THAT THE INTRA-CORPORATE CONSPIRACY DOCTRINE APPLIES AS THE RESPONDENT/EMPLOYEES WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Even if an exception to the intra-corporate conspiracy doctrine exists when the challenged activity takes place outside the course of employment, there was no evidence, as the Sixth Circuit Court of Appeals found, to establish that the employees' alleged conduct here met that standard. The district court and the Court of Appeals properly found that there was no genuine issue of material fact and that the Respondents acted at all times in their capacity as employees of Hills & Dales General Hospital. Thus, as the lower courts found, the Respondents constituted a single legal entity incapable of entering into a conspiracy.

In order to prevent summary judgment, the non-moving party must proffer evidence that is admissible. Affidavits supporting or opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986). Applying this standard, it is evident that Petitioner failed to meet her burden and that the motion for summary judgment was properly granted.

In undisputed testimony, all Respondents who were deposed stated that they took their actions following the chain of command. Furthermore, there was testimony by Respondents that the reason for taking their concerns to management was the hospital. Specifically, Rhonda Hume testified that she was concerned about the layoffs occurring at the hospital, and the fact that costs from Dr. Johnson's excessive testing and demeanor could affect the financial status of the hospital and have to be absorbed by the hospital (see Appendix D, R. 98: Rhonda Hume Dep., p. 28, *infra* at D-1–D-2).

There was, moreover, no admissible *evidence* from any source that Petitioner's race played any role in this matter. *By Petitioner's own admission, other similarly-situated black physicians who worked at the hospital were not treated any differently because they were black.* At her deposition, Petitioner testified that the other black MasterCare physicians did not experience similar problems with the individual Respondents (see Appendix A, R. 79, Petitioner's Dep. pp. 140-141, *infra* at A-2–A-3). Petitioner admitted at her deposition that she was unaware of any prior problems with other black physicians and that she was aware that other black physicians had worked at the hospital through MasterCare without similar incidents or employee problems (see Appendix A, R. 79: Petitioner's Dep., pp. 140-141, *infra* at A-2–A-3).

All of the "facts" which Petitioner claims establish race discrimination or a discriminatory motive were based on conclusory assertions without evidentiary support or upon inadmissible hearsay characterizations by Petitioner which were not only uncorroborated but affirmatively contradicted by those to whom she attributed such statements, through deposition or affidavit.

For example, Petitioner testified that MasterCare representative, Lora Jones, informed Petitioner that she

was no longer being scheduled at Hills & Dales General Hospital at the hospital's request because she was black. However, Ms. Jones denied this inadmissible hearsay assertion, and testified that Mr. Jensen requested that Petitioner be removed from the schedule, *but that he never stated or intimated that the reason was because Plaintiff was black or female*:

> "Q. At any time, did Mr. Jensen tell you that he didn't want Dr. Johnson scheduled at the facility because she was an African American or because she was black?
>
> A. No.
>
> Q. Did he ever tell you that he didn't want her scheduled at the facility because she was a female?
>
> A. No.
>
> Q. Did he ever combine the two and say that she was black female, that was the reason he didn't want her?
>
> A. No."
>
> * * *
>
> "Q. Okay did he at any time ever tell you that there were some personality problems between Dr. Johnson and any of his staff?
>
> A. No."
>
> (See Appendix E, R. 79: Lora Jones Dep. p. 19, *infra* at E-1–E-2).

Ms. Jones further testified that Petitioner's quality of care was never questioned *and that the hospital's request had no effect upon MasterCare's continuing contractual relationship with the Petitioner.* (See Appendix E, R. 79: Lora Jones Dep. pp. 40, 42 & 45, *infra* at E-2–E-3).

Mr. Jensen confirmed that although he believed that Petitioner was a good physician, there was turmoil at the hospital which adversely affected employee moral, and this was the basis for his decision to request that MasterCare no longer schedule Petitioner at Hills & Dales General Hospital (See Appendix C, R. 79 and R. 97: Jensen Dep., pp. 40-42, 45, *infra* at C-1-C-4).

Also irrelevant (and less than entirely candid), is Petitioner's reliance upon deposition testimony by Rhonda Hume in which she indicated that as a young adult she might have used a racial slur to refer to a black person. Ms. Hume vigorously declared that she never used any racially derogatory terms regarding Dr. Johnson, that she harbors no animus for Dr. Johnson because she was black, and that while Ms. Hume might have told a racially derogatory joke as a 14 year old or younger, she has not used a racially derogatory term in the last ten years (See Appendix D, R. 98: Hume Dep., pp. 43, 46-47, *infra* at D-2-D-4).

The record further fully supported the conclusion by both the district court and the Court of Appeals that all of the comments or incidents assailed by Petitioner occurred while the individual Respondents were acting within the scope of their employment. As the Sixth Circuit Court of Appeals concluded, it is clear that any comments of the individual Respondents were connected to the legitimate business of Hills & Dales General Hospital and the work of its staff. Thus, since the Petitioner failed to establish that the individual Respondents acted outside the course of their employment, the intra-corporate conspiracy rule was correctly applied and summary judgment was properly granted.

## CONCLUSION AND RELIEF REQUESTED

Respondents Hills & Dales General Hospital, Theresa Deering, Dale Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew and Tom Oesch submit that the trial court properly granted, and the Court of Appeals properly affirmed their motion for summary judgment. Both courts properly found that the intra-conspiracy doctrine applies to this cause of action and that plaintiff could not prove the requisite element of such doctrine. Further, the Court of Appeals properly found that the individual Respondents were acting within the scope of their employment and that, therefore, the intra-corporate conspiracy rule applies.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied because the lower court decisions were proper on the merits.

WHEREFORE, Respondents, Hills & Dales General Hospital, Theresa Deering, Dale Weidman, Doris Donahue, Ken Jensen, Rhonda Hume, Theron Middaugh, Craig Bellew and Tom Oesch respectfully request that this Honorable Court deny the Petition for Writ of Certiorari and grant costs and attorney fees to these respondents.

Respectfully submitted,

By: /s/ LINDA M. GARBARINO
*Counsel of Record*

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One Woodward Avenue, Tenth Floor
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(313) 965-6806

*Attorney for Respondents*

DATED: March 15, 1995

# APPENDICES TO BRIEF FOR RESPONDENTS

• • •

## APPENDIX A

### EXCERPTS FROM PETITIONER'S DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of October 8, 1991)

(VIVIAN JOHNSON, M.D., Plaintiff, -vs- HILLS AND DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, JON FAHRNER, KEN JENSEN, MIKE WIDELY, TOM ESCH [*sic*], JOANNE BROWN and CINDY KLAUS, jointly and severally, Defendants — Civil Action No. 91 CV 73601 DT)

* * *

(47) * * * Q. He was through Master Care?

A. Yes.

Q. Do you have a copy of that document?

A. I believe I might be able to retrieve it. I'm not sure.

Q. What about for April, did you work all the weekends that you were scheduled on this schedule?

A. All the weekends that I was allowed.

Q. When was the last date that you worked at Hills and Dales?

Q. I was terminated on the 15th so it would be the morning of the 16th.

Q. You did work the morning of the 16th, is that what you are saying?

A. Yes, that was the last day that I worked there, although I was scheduled for the 27th, the weekend of

the 27th and I was also scheduled as you have here for the three weekends, one, two, three, in —

Q. May?

A. Uh huh, but I was terminated prior to that.

* * *

[(139) * * * Q. . . .] (140) is the factual underpinnings of that claim that you think that the other people, all of the individual defendants were doing the things that you've claimed that they've done to you because you are black.

A. Yes.

Q. How is it that you've come to that conclusion?

A. Because I was asking nursing staff if other physicians who had worked the emergency room got that kind of treatment or response from the hospital personnel that worked in the area.

Q. And they said no?

A. Yes.

Q. Are you aware if there were ever any other black physicians that worked there?

A. Yes.

Q. And did that other black physician —

MR. POSNER: That assumes a fact not in evidence. The question is whether she is aware whether there were any other blacks. That can be yes or no that there were or were not.

MS. BERKERY: What do you mean?

MR. POSNER: When you say are you aware whether there are any other blacks and the (141) answer is yes, that might mean there were no other blacks and I know that or it might mean that there were other blacks and I know that.

BY MS. BERKERY:

Q. Were you aware that there were other black physicians who worked at Master Care, worked through Master Care at Hills and Dales?

A. Yes, I was aware of that.

Q. Who were they, do you know their names?

A. Yes, I know one or two.

Q. What were their names?

A. Dr. Kimbro.

Q. Kimbro?

A. Uh huh.

Q. And what was the other person's name?

A. Dr. Smith.

Q. Did nursing staff tell you that these other black physicians had the same sorts of problems with these individual defendants?

A. No, they didn't.

* * *

# APPENDIX B

## EMPLOYEE MEMO

MEMO: Employee problems with Dr. Johnson, E.R. physician

TO: Mr. Curtis Landrith, R.N., Director of Nursing
Mr. Ken Jensen, President
Mr. Jon Fahrner M.T. (AMT), Laboratory Supervisor

There have been many problems concerning Dr. Johnson amongst hospital employees. Some of the laboratory concerns are listed below.

1. Orders excessive or seemingly inappropriate tests.
   A. Has standing blanket orders on adults and children and repeats these same series of tests on nearly every patient.
      1. *adult patients:* electrolytes, calcium, BUN, US, creatinine, glucose, LDH, CK, CKMB, CBC and blood cultures — ordered even on non-febrile patients
      2. *children:* Electrolytes, calcuim, BUN, UA, glucose, CBC, blood cultures — ordered even on non-febrile patients.
   B. Orders repeat testing of same lab tests previously done, even when initial tests were normal.
      i.e. infant Lillian Boyce
      i.e. repeat normal drug levels (sent out special) on an overdose patient.
2. Has expressed disbelief of laboratory results and has questioned the professionalism and knowledge of laboratory employees and other staff in front of other employees.

3. Has demonstrated distaste for hospital and medical staff policies. i.e.: cardiac profile sequence; does not agree with the times drawn or the tests included.

4. Has adversely affected the employee morale of the lab employees and of other departments.

5. Has shown a lack of professionalism by verbally defaming and ridiculing hospital employees and some of the medical staff, in their absence, to other hospital employees.

6. It has been stated by some hospital employees that Dr. Johnson has based some of her orders upon who is working in the department to be utilized, and depending upon her dislike for the employee working. i.e.: extra or late x-rays or lab tests.

6. [*sic*] There has also been extensive rumors of inappropriate writing and filling of prescriptions, the preferential treatment of patients having certain types of insurance or of a certain economic status, and the cohabitation of Dr. Johnson and her boyfriend while she was on duty and in the employ of Hills and Dales General.

There definitely appears to be a problem with Dr. Johnson's affiliation with Hills and Dales and the hospital employees. Before it is determined that there is "no trouble", additional employees should be interviewed. The ill-feelings between Dr. Johnson and many hospital employees cannot all be attributed to "personality conflicts".

As valued employees of Hills and Dales, our interests lie primarily in obtaining the best medical care for our patients. However, hospital reputation, cost containment and employee morale are also major concerns.

Since there are serious doubts about Dr. Johnson amongst employees, administration and supervisors

should consider trusting in the instincts of their hospital staff, and the misgivings concerning Dr. Johnson.

Hills and Dales is "our" hospital in "our" community. We, as employees, have a vested interest in the continued success of Hills and Dales, seven days a week, not just on occasional weekends.

Respectfully submitted,

/s/ Ronda K. Hume MT (ASCP) BS
Doris Donahue MT AMT HEW
Dale Weidman MT (AMT) HEW
[*Illegible*], Lab Ass't

# APPENDIX C

## EXCERPTS FROM JENSEN DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of November 14, 1991)

(DR. VIVIAN JOHNSON, M.D., Plaintiff, vs HILLS AND DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, JOHN FAHRNER, KEN JENSEN, MIKE WIDELY, TOM ESCH [*sic*], JOANNE BROWN, and CINDY KLAUS, jointly and severally, Defendants — FILE NO. 91 CV 73601 DT; HON. BERNARD A. FRIEDMAN)

* * *

(40) * * * Q. Do you recall speaking with anybody besides Fahrner and Landrith following the memo from Hume?

A. Not that I recollect right this minute.

Q. Okay. That basically concluded your investigation?

A. Uh-huh (affirmative).

Q. You have to say "yes."

A. Yes.

Q. At the conclusion of your investigation did you believe the allegations in the memo, Exhibit 2?

A. It didn't really matter whether I believed the allocations [*sic*] or not. I obviously had turmoil going within the hospital in separate departments, and I couldn't tolerate that.

Q. You decided, whether or not the allegations were true, you were not going to tolerate the turmoil; is that fair?

A. True.

Q. Understanding that, and I realize it may not have been important to you to your decision making, I would

like to know whether or not you believed any of the allegations, some of them or all of them at the conclusion of your investigation.

MS. BERKERY: Or whether you even made a decision whether you believed them or not.

(41) (Witness reviews document)

A. Well, I guess there's an item or two here that I could believe, yeah.

Q. What would be the items that you could believe as of —

A. Has adversely —

Q. — as of that time?

A. Pardon me?

Q. What would be the items that you could believe as of that time?

A. Has adversely affected my employee morale.

Q. Anything else?

A. That's enough.

Q. Okay. You indicated there was turmoil. What do you mean by that? What was going on?

A. The x-ray people were very upset. The lab people were very upset. Nursing was very pleased and happy. Everything was fine with them. We had these people going at each other, and there was — it was a significant problem.

Q. When you say, "We had these people going at each other," what do you mean by that?

A. Well, you had the two — at least two departments were having problems with Dr. Johnson, for whatever reason, and nursing was not. Nursing was aware the situation had been brought to my attention, and they made sure they communicated their feelings to me also. So that was the (42) dilemma I had.

Q. With respect to the portions of the memo that referred to the writers' opinions regarding testing and

whether or not it was excessive or inappropriate, what did you make of that, if anything?

A. I didn't even consider those kinds of things. Those are medical staff issues. I didn't really have a problem with those things.

Q. You felt that it really wasn't within the qualifications of the lab people to comment on that; —

MS. BERKERY: Objection. Foundation.

Q. — is that fair?

MS. BERKERY: If you want to ask him a question, I mean, that he can answer — I mean, you're trying to put words in his mouth. I mean —

Q. Well, did you feel that they were qualified to —

A. I didn't consider the —

MS. BERKERY: Asked and answered.

A. — comments. I didn't consider the comments because they were medical staff matters.

* * *

(45) * * * Q. Who made that decision?

A. I did.

Q. Did anybody participate with you in that decision?

A. No.

Q. And what was your reason for — or reasons for the termination?

MS. BERKERY: You mean removing her from the schedule?

MR. POSNER: Yes.

A. Removing her from the schedule?

Q. Sure.

A. Because of the unrest of the staff adversely affecting the morale within the hospital. I had a real problem brewing. That was a sufficient reason.

Q. Let me ask you this: Other than the presentation of this memo, how did the unrest of the staff manifest itself? In other words, what was going on?

A. Well, they were just very irritated. They were frustrated. And I guess that pretty well covers it. They were irritated and frustrated and —

Q. And this is what you were told?

A. That's right. Well, and I could — I could certainly observe that in a couple of cases.

* * *

# APPENDIX D

## EXCERPTS FROM HUME DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of November 14, 1991)

(DR. VIVIAN JOHNSON, M.D., Plaintiff, vs HILLS AND DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, JOHN FAHRNER, KEN JENSEN, MIKE WIDELY, TOM ESCH [*sic*], JOANNE BROWN, and CINDY KLAUS, jointly and severally, Defendants — FILE NO. 91 CV 73601 DT; HON. BERNARD A. FRIEDMAN)

* * *

(28) * * * Q. Why would you take it upon yourself to raise this issue, as a lab tech, concerning doctors?

A. Why would I? I think part of it might be — this is all I can think of right now — that we are laying off people, we're trying to cut costs, and I don't see the point in doing inappropriate tests that the hospital might have to absorb the cost of. And that's the only explanation I can think of right now.

Q. Has the administration in the past had any discussions with you — not you alone, but with you and your department — about cost consciousness for the hospital?

A. It's been brought up. I don't recall where, but — oh, yeah, now I do recall wh-- — just recently in fact Mr. Jensen brought up that we're tying to keep costs down, and if you have any ideas to save money, let him know.

Q. That was after Dr. Johnson's —

A. Yes, it was.

Q. — relationship here? Okay. In the past when you've mentioned this subject of possibly excessive or inappropriate tests to your supervisors, what kind of feedback have you gotten from them?

A. I do not — I don't remember what he said. . . .

* * *

(43) * * * Q. Have you heard negative comments about — let's say, about people on welfare in Detroit —

MS. BERKERY: Same objection.

Q. — here at the hospital?

A. I've heard negative comments about people on welfare, but they don't necessarily have to obtain [*sic*] to the people in Detroit.

Q. Okay. Or have you heard negative comments about the blacks in Detroit?

A. Well, not with whom I was speaking with.

Q. Have you heard any of your coemployees ever use a racial slur to refer to a black person?

A. No.

Q. Have you ever used, in your adult life, a racial slur to refer to a black person.

A. I'm sure I have as a younger adult.

Q. Okay. I may have asked you this. If I did, I apologize. I think you said this is the first time you ever prepared a memo about a physician at the hospital; is that fair?

A. That's correct.

* * *

(46) * * * Q. And in that respect, completely apart from the question of medical training, the ER physician would be in a better position to determine what lab tests are appropriate than you, wouldn't he or she?

A. Yes, that's true.

MR. POSNER: I don't have anything else.

MS. BERKERY: I have a couple of questions to clear up.

EXAMINATION BY MS. BERKERY:

Q. Ms. Hume, as you know, my name is Karen Berkery. I represent the hospital in this matter. Have you ever used any racially derogatory words concerning Dr. Johnson?

A. No, I haven't.

Q. Do you harbor any dislike for Dr. Johnson because she's black?

A. No, I did not.

Q. Did you harbor any dislike for Dr. Johnson because she was a woman?

A. Oh, absolutely not.

Q. What about because she was a black woman?

A. No.

Q. Okay. Did you write this memo that we've been talking (47) about — I forget what exhibit number it is —

A. 2.

Q. — 2 — because Dr. Johnson was a black female?

A. No.

Q. I think earlier you may have answered a question where you indicated that you may have used a racially derogatory term in your young adulthood or something. Would you say that's been any time since your early teens?

MR. POSNER: Well, I think you're leading the witness. I think the question related to her adult life, and she answered that she did.

A. Well, I consider adult life puberty on. And I'm sure as a 14 year old I might have told an off colored joke or something when I was younger and not as — quite as experienced, I guess.

Q. All right. What about in the last ten years? Why don't we put it that way.

A. Last ten years, no.

MS. BERKERY: Okay. I have nothing further.

MR. POSNER: Nothing else.

# APPENDIX E

## EXCERPTS FROM JONES DEPOSITION

(United States District Court —
Eastern District of Michigan —
Southern Division)

(Deposition of February 11, 1992)

(VIVIAN JOHNSON, M.D., Plaintiff, vs. HILLS & DALES GENERAL HOSPITAL, THERESA DEERING, DALE WEIDMAN, MYRYKA WEIDMAN, DORIS DONAHUE, RONDA HUME, THERON MIDDAUGH, CRAIG BELLEW, KEN JENSEN, TOM OESCH, JOANNE BROWN and CINDY KLAUS, Defendants — Case No. 91 CV 73601 DT; HON. BERNARD A. FRIEDMAN)

* * *

(19) * * * Q. At any time, did Mr. Jensen tell you that he didn't want Dr. Johnson scheduled at the facility because she was an African-American or because she's black?

A. No.

Q. Did he ever tell you that he didn't want her scheduled at the facility because she was a female?

A. No.

Q. Did he ever combine the two and say that she was a black female, that was the reason he didn't want her?

A. No.

Q. Okay. Did he go into anything further with you regarding these petitions? Did he describe what they were about?

A. No.

Q. Okay. Did he, at any time, ever tell you that there was some personality problems between Dr. Johnson and any of his staff?

A. No.

Q. Okay. After Dr. Johnson was no longer being scheduled — well, strike that.

After you spoke to Mr. Jensen, did you then not schedule Dr. Johnson at Hills and Dales anymore?

A. That's correct.

* * *

(40) * * * Q. Okay. Well, you indicated that the reason that MasterCare went out of business, so far as you were aware, was medical liability insurance costs.

A. One of the major factors, yes.

Q. I assume, before MasterCare closed its doors, you were made aware of the fact that medical liability costs were a problem for the business.

A. Yes.

Q. Okay. And therefore, MasterCare would have some concern about scheduling physicians if MasterCare had some reason to believe that the physician would not be offering quality care, is that fair?

A. Can you repeat that again?

Q. Sure. In other words, would MasterCare have some concerns about scheduling a physician at a hospital if MasterCare had some reason to believe that the physician wasn't offering quality care?

A. That's correct.

Q. Okay. And so if a hospital administrator informed MasterCare that they didn't want a particular physician scheduled anymore, would that raise in your mind the question of whether or not there might be a quality of care issue here that perhaps we ought to ask about?

A. A quality of care question?

* * *

(42) * * * Q. Okay. And he didn't lead you to believe that there was a quality of care issue?

A. No, he did not lead me to believe anything.

Q. Okay. Did it trouble you at all that there was a quality of care issue?

A. No, he did not lead me to believe anything.

Q. Okay. Did it trouble you at all that there was a doctor on your schedule who you would be sending or scheduling for various hospitals, and the hospital administrator of one of those hospitals says he does not want to get into reasons?

A. No.

Q. So you didn't take that issue up with Dr. Servis or Ms. Kelley to see if they might get back to the hospital and find out what's going on here?

A. I informed them of what their request was, and they basically just said, then abide by their request.

Q. So neither Dr. Servis nor Ms. Kelley asked you, what did Mr. Jensen mean by that? Or what his reasons were?

A. No, not that I can recall.

Q. Okay. When you spoke with Dr. Johnson to inform her that Hills and Dales no longer wanted her on the schedule, was that by telephone?

A. Yes.

* * *

(45) Q. All right. Now, you had scheduled Dr. Johnson over a period of several months at Oceana Hospital in Hart and at Lansing Occupational Medical Center, is that correct?

A. That's correct.

Q. And even after Mr. Jensen told you that he didn't want Dr. Johnson on the Hills and Dales schedule anymore, you had no fear of placing Dr. Johnson at other hospitals, is that correct?

A. That's correct.

Q. And, in fact, you had no other negative feedback from any other hospital regarding Dr. Johnson, is that correct?

A. That's correct.

* * *